

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SHAWN A. FLETCHER,)	NO. CV 08-4332-AHM (CT)
)	
Petitioner,)	
)	ORDER ACCEPTING MAGISTRATE
v.)	JUDGE'S REPORT AND
)	RECOMMENDATION AND DENYING
M. C. KRAMMER, Warden,)	MOTION TO STAY THE PROCEEDINGS
)	
Respondent.)	

Pursuant to 28 U.S.C. § 636, the Court has reviewed the entire file de novo, including the magistrate judge's report and recommendation, petitioner's first amended petition, petitioner's motion for a stay of the proceedings and petitioner's motions for judicial notice.

In the report and recommendation, the magistrate judge recommended dismissal of the petition without prejudice for failure to exhaust state remedies, unless petitioner filed a fully exhausted first amended petition. See Jefferson v. Budge, 419 F.3d 1013, 1016 (9th Cir. 2005) (holding that before dismissal of mixed petition containing both exhausted and unexhausted grounds, court must give petitioner "the choice of returning to state court to exhaust his [grounds] or of amending or resubmitting the habeas

1 petition to present only exhausted [grounds] to the district
2 court.'" (quoting Rose v. Lundy, 455 U.S. 509, 510 (1982)).

3 On July 24, 2008, petitioner filed a first amended petition.
4 The first amended petition is not fully exhausted. Specifically,
5 in ground four, petitioner asserts five separate claims of
6 constitutionally ineffective assistance by his trial counsel,
7 including "failure to investigate issues of case." (Am. Pet. at
8 6). However, in his petition for review to the California Supreme
9 Court, which is attached to the first amended petition, petitioner
10 raised five specific claims of ineffective assistance of counsel
11 and "failure to investigate issues of case" was not one of them.
12 (See Am. Pet., attached Petition for Review at 13-15).

13 Further, the court takes judicial notice of the case
14 information on the California appellate courts' official website,
15 www.courtinfo.ca.gov, which indicates that on July 23, 2008,
16 petitioner filed a petition for writ of habeas corpus in the
17 California Supreme Court. (See California Appellate Courts - Case
18 Information - Supreme Court Case No. S165371 at
19 www.courtinfo.ca.gov). Where there is a pending post-conviction
20 proceeding in state court, the exhaustion requirement is not
21 satisfied. See Sherwood v. Tomkins, 716 F.2d 632, 634 (9th Cir.
22 1983) ("When . . . an appeal of a state criminal conviction is
23 pending, a would-be habeas corpus petitioner must await the outcome
24 of his appeal before his state remedies are exhausted, even where
25 the issue to be challenged in the writ of habeas corpus has been
26 finally settled in the state courts.")

27 Accordingly, despite being given an opportunity to amend,
28

1 petitioner has failed to fully exhaust his state remedies and the
2 first amended petition must be dismissed without prejudice.

3 At the same time petitioner filed his first amended petition,
4 he also filed a motion to stay the proceedings while he returns to
5 state court to exhaust his unexhausted grounds. However, although
6 a district court has discretion to stay a mixed petition, "stay and
7 abeyance should be available only in limited circumstances."
8 Rhines v. Weber, 544 U.S. 269, 277 (2005). Specifically, "stay and
9 abeyance is only appropriate when the district court determines
10 there was good cause for the petitioner's failure to exhaust his
11 claims first in state court." Id. Petitioner has not demonstrated
12 good cause for his failure to exhaust his state remedies before
13 filing his federal petition.

14 Moreover, according to the face of the amended petition, the
15 California Supreme Court denied petitioner's petition for review on
16 November 14, 2007. (Am. Pet. at 3). If that is the case, then
17 petitioner still has some time left before the statute of
18 limitations expires. See 28 U.S.C. § 2244(d) (The one-year period
19 of limitation applicable to federal habeas petitions filed by state
20 prisoners generally runs from the date on which the judgment became
21 final by the conclusion of direct review or the expiration of time
22 for seeking such review and is tolled during the period of time in
23 which a properly filed application for state post-conviction or
24 other collateral review is pending).

25 Petitioner's motions for judicial notice are denied.

26 ACCORDINGLY, IT IS ORDERED THAT:

27 1. The motion to stay the proceedings is denied.

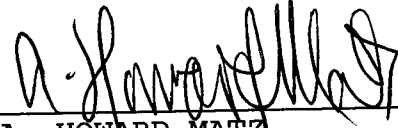
1 2. The report and recommendation is accepted.

2 3. Judgment shall be entered consistent with this order.

3 4. The clerk shall serve this order and the judgment on all
4 counsel or parties of record.

5 DATED:

August 18, 2008



A. HOWARD MATZ
UNITED STATES DISTRICT JUDGE